sHIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting.)

(Chapter VIII Rule 32 (2)(b)

Description of the case

Criminal Appeal No. 210 of 2001
(1) Ramesh S/o Mohan Singh
(2) Krishan Bahadur S/o Bhim Bahadur
Vs.
State of Uttaranchal.

Approved for reporting

~~Not approved for reporting~~

Date of decision 04.8.2004.

Initial of Judge

Reserved

HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No. 210 of 2001

1. Ramesh Son of Mohan Singh
2. Kishan Bahadur son of Bhim Bahadur
   Both resident of village Lat, Tehsil Tulsipur
   District Dang (Nepal) ..... Appellants

Versus

State of Uttaranchal ..... Respondent

Sri Pankaj Purohit, Advocate for the appellants
Additional Govt. Advocate for the respondent.

Dated: August 4, 2004

Hon. P.C. Verma J.
Hon. Rajesh Tandon J.

Delivered by Hon. Rajesh Tandon J.

This is an appeal against the judgment and order dated 4.5.2000 passed by Sri Jai Dev Singh, the then Additional District and Sessions Judge, Rudraprayag, convicting the accused appellants under section 302 read with section 34 and section 201 I.P.C. and sentencing them to undergo imprisonment for life under section 302/34 I.P.C. and further to undergo five years rigorous imprisonment and to pay a sum of Rs.10,000/- each as fine under section 201 I.P.C. and in default of payment of fine further to undergo simple imprisonment for a period of three years.

Briefly stated the facts giving rise to the present appeal are that complainant Satey Singh lodged a written report on 12.9.2000 at 8.50 AM at Police Outpost, Gaurikund, P.S. Ukhimath, District Rudraprayag stating therein that earlier he lodged a report on 7.9.2000 at about 8.50 AM about missing of his brother Umed Singh. On 11.9.2000 one Sri Rakesh Chandra informed the complainant that on 4.9.2000 deceased Umed Singh along with Ramesh, Prem Bahadur and Kishan Bahadur boarded his Taxi Tata Summo No. UP 18/0013 at Gaurikund and were dropped at Baura in between Rampur and Badalpur and went towards the river.

The complainant also mentioned in the written report that one Shishupal Singh also informed him that on 4.9.2000 he saw three Nepalies namely Ramesh, Prem Bahadur and Kishan Bahadur quarrelling with Umed Singh. Complainant has stated that on 5.9.2000 he went to0 Ghansali, District Tehri Garhwal in search of labourers and came back to his home on 11.9.2000 and he came to know that dead body of Umed Singh was recovered from Mandakani river.

The complainant also stated that Amar Singh son of Makan Singh also informed him that on 4.9.2000 he (Amar Singh) was returning from Gaurikund after selling milk. At about 1.30 PM he saw Ramesh, Prem Bahadur and Kishan Bahadur coming from the side of river. On 5.9.2000 he went to Tehri and on coming to his home on 11.9.2000 he came to know that dead body of Umed Singh was recovered from the river.

The complainant expressed suspicion that all there culprits might be the murderers of his brother. He has also mentioned that his brother Umed Singh informed him many time that Ramesh took Rs. 20,000/- as loan from him for

purchase of VCR and T.V. but he had not repaid the same despite of assurance.

On the basis of written report Ex.ka-1, chick F.I.R. Ex.ka-3 was prepared and a case under section 302 and 201 I.P.C. was registered against the accused persons. The investigation of the case was entrusted to S.I. Yogendra Singh.

The Investigating Officer visited the place of occurrence and prepared site plan Ex. Ka-8 and Ka-9. He prepared inquest report of the dead body Ex.ka-5 and sent the dead body for post mortem examination. He recorded the statements of witnesses. Thereafter the investigation was transferred to S.I. Ajai Shah, who arrested two of the accused persons namely Ramesh and Kishan Bahadur and interrogated them. He recovered the clothes of the deceased at the instance of the accused persons and prepared recovery memo Ex.ka-6. He also prepared site plan of the place of recovery of dead body, which is Ex.ka-14. After completing the investigation he submitted charge sheet against the accused persons, which is Ex.ka-15 on the record.

Accused were committed to the Court of Sessions by the Chief Judicial Magistrate Rudraprayag vide order dated 3.1.2001. Charges under section 302 and 201 I.P.C. were framed against the accused persons by the Sessions Judge. The accused persons denied the charges against them and claimed to be tried.

To prove its case the prosecution examined P.W.1 Satey Singh, who is the complainant of the case. He reproduced the averments made in the written report, in his statement and proved written report Ex.ka-1.

P.W.2 Rakesh Chandra Tiwari, is the driver of Tata Summo No. UP 18-0013. He has stated in his statement on oath

that on 4.9.2000 at about 11.00 AM he left Gaurikund for Ukhimath. Accused persons along with deceased Umed Singh also boarded his taxi. Accused persons along with Umed Singh dropped near Rampur and they went towards the river. This witness has stated that after dropping the passengers at Ukhimath he went to Dehradun for repairing his vehicle.

P.W.3 Amar Singh has stated on oath that he used to sell milk at Gaurikund. He knows the accused persons and the deceased since before the incident. On 4.9.2000 he was returning to his village after selling milk. At about 1.30 PM he saw the accused persons coming from the side of river. Their cloths were soaked with water. When this witness enquired from then as to from where they were coming, they did not reply. Later on he came to know that dead body of Umed Singh was recovered from the river.

P.W.4 is Dr. Anupam Chaturvedi. He conducted post mortem examination on the dead body of the deceased on 8.9.2000. He proved the post mortem report Ex. Ka-2. The doctor found the following ante mortem injuries on the dead body of Umed Singh:

1. Skull broken in the area of left frontal & parietal zone measuring area 12 cm.x 2cm.
2. Contusion over both left & right forehead between left and right eyes.
3. Fracture over the shoulder in the left collar bone with contusion over the same area.
4. Contusion over right shoulder.
5. Multiple abrasion over the back.
6. Multiple abrasion over right knee.

In the opinion of the doctor the cause of death was brain haemorrhage due to injury no.1 and 3. Duration of the injuries was three to four days before post mortem examination. P.W.4 also opined that injury no. 1 and 3 may be caused by lathi and danda. Injury no. 2 and 4 may be caused by stones and injury no.5 and 6 may be caused by friction on the earth.

P.W.5 Shishupal has stated that on 4.9.2000 at about 12.30 PM he saw accused Kishan Bahadur, Prem Bahadur and Ramesh Bahadur along with deceased Umed Singh at Kaladungi Gadhera. All the three accused persons were quarrelling with deceased Umed Singh. Thereafter he had gone to Ghansali for making arrangement of labourers. When he came back on 11.9.2000 he came to know that dead body of Umed Singh has been recovered from the river. He also deposed that the deceased and accused persons were friends. Accused persons took a loan of Rs. 20,000/- from the deceased but did not return the same and due to this reason they committed murder of Umed Singh.

P.W.6 Constable Jaibir Singh was posted as Constable Clerk at Police Outpost, Gaurikund. He has written chick F.I.R. and registered the case in the G.D. He proved Chick F.I.R. Ex.ka-3 and copy of G.D. Ex.ka-4. He is a formal witness.

P.W. 7 Dharshan Singh is the witness of Panchayatnama. He proved his signature of Panchayatnama Ex.ka.5. He is a formal witness.

P.W.8 Mohan Singh has proved recovery of clothes of the deceased at the instance of accused persons. He proved material Ex. 1 to 3 and recovery memo Ex.ka-6

P.W.9 Ajai Shah was posted as S.O. Police Station Ukhimath. He also conducted part of investigation of the case.

He narrated investigation of the case. He has stated that initially the investigation of the case was entrusted to S.I. Yogendra Singh. He proved the handwriting and signatures of S.I. Yogendra Singh on Panchayatnama Ex.ka.5. He has also stated that S.I. Yogendra Singh had recorded statements of witnesses Jasbir Singh, Satey Singh, Amar Singh, Darshan Singh, Shishupal Singh and Rakesh under section 161 Cr.P.C. He also prepared site plans Ex.ka-8 and ka-9. This witness proved the signatures of S.I. Yogendra Singh on Ex.ka-8 and Ex.ka-9. He has also stated that S.I. Yogendra Singh recorded the statement of Rajendra Pratap Singh and statements of the wife and mother of accused Ramesh. Thereafter the investigation was transferred to this witness. P.W. 9 Ajai Shah has further stated that on 13.9.2000 he arrested the accused Ramesh and Kishan Bahadur and made entry to this effect in the G.D. He interrogated the accused persons and at the instance of accused persons recovered clothes and shoes of the deceased from the riverbank. He has prepared recovery memo at the spot and proved the same as Ex.ka-13. He also prepared site plan of the place from where the dead body of Umed Singh was recovered and proved it as Ex.ka-14. P.W.9 Anil Shah has stated that accused Prem Bahadur has been absconded and could not be arrested during investigation. After completing the investigation he submitted charge sheet against the accused persons.

In their statements under section 313 Cr.P.C. the accused persons denied prosecution case and have stated that they were the labourers and did not know deceased Umed Singh. Witnesses have not made correct statements and the police has falsely implicated them in the case.

The learned Sessions Judge after considering the entire evidence on record has held that the prosecution has proved its case against the accused persons beyond all reasonable doubts and convicted and sentenced the accused persons under section 302/34 and 201 I.P.C. as stated above.

Feeling aggrieved the present appeal has been filed by the accused appellant.

We have heard the learned counsel for the parties and have perused the evidence on record.

Undisputedly, there is no eyewitness to the occurrence and conviction of the appellant is solely based on the circumstantial evidence.

The learned Sessions Judge based the conviction of the accused persons on the following circumstances:

(i) Motive of the crime stated by the witnesses as to lent money to the accused by the deceased and repeated demand to return the money by the deceased from the accused persons.

(ii) The recovery of the dead body of the deceased and identity of the deceased was established.

(iii) The deceased was last seen in the company of the accused.

(iv) Recovery of the clothes of the deceased at the instance of the accused persons.

(v) Extra judicial confession made by the accused persons.

(vi) The accused failed to adduce any evidence to contra to prove the so called oblique motive of the witnesses to implicate them in the false case.

(viii) Conduct of one of the accused namely Prem Bahadur, as he is absconding since the date of occurrence.

It is well settled principle of law that in case where the evidence is purely circumstantial in nature, the facts and circumstances from which the conclusion of guilt is sought to be drawn must be fully established beyond any reasonable doubt an such circumstances must be consistent and unerringly point out the guilt of the accused and the chain of circumstances must be complete.

Circumstance No.(i)

In the case of circumstantial evidence motive plays an important role. In the instant case the alleged motive behind the crime is lending money by the deceased to the accused and repeated demand for its return. The motive of the crime itself found place in the first information report. The scribe of the F.IR. P.W.1 Satey Singh has mentioned in the written report that deceased Umed Singh had told several times to him that accused Ramesh has borrowed Rs.20,000/- from him to purchase T.V. and V.C.R. but did not repay the same despite assurance. P.W.9 Ajai Shah, Investigating Officer also stated in his statement on oath that on interrogation from the accused they have submitted that their motive behind the crime was lending of money by the deceased to the accused persons. P.W.5 shishupal Singh also narrated this fact in his examination in-chief. It will appear from the F.I.R. that motive is available in the F.I.R. itself.

In the present case F.I.R. itself has been lodged after a delay of eight days. The incident is said to have taken place on 4th September 2000 whereas the written report (Ex.ka-1) was

prepared on 12.9.2000 on the basis of which the chick report was prepared at Police Outpost Gaurikund on 12.9.2000 at 7.30 A.M. In fact report regarding missing of deceased Umed Singh was lodged by his brother Satey Singh on 7.9.2000 at 8.50 AM in the same Police Outpost, Gaurikund. A copy of G.D. No.10 dated 7.9.2000 is paper no. 30-ka on record. Surprisingly enough that after recovery of the dead body of the deceased from the riverbed on the same day at 11.30 AM, this report was not treated as F.I.R. and no case of murder of the deceased was registered in the Police Station. It was after five days on 12.9.2000 when another written report was called for from Satey Singh in which he mentioned the statements of the witnesses Rakesh Chand, Shishupal Singh and Amar Singh and on the basis of their alleged statements tried to held the accused person guilty of murder of deceased Umed Singh.

A perusal of the written report Ex.ka.-1 shows that all the alleged witnesses Rakesh, Shishupal and Amar Singh told regarding the circumstances proving the accused persons guilty of murder on 11.9.2000 i.e. one day earlier to lodging of written report. The exact words used in the written report are as under:

कल सुबह 11.9.2000 को श्री राकेश चन्द्र पुत्र श्री जगन्नाथ तिवाडी निवासी उखीमठ ने मुझे आकर बताया कि 4.9.2000 को .....

एवं कल ही शिशुपालसिंह पुत्र श्री बचनसिंह ग्रा0 न्यालसू ने मेरे घर आकर बताया कि दिनांक 4.9.2000 को जब मैं जंगल में छउीला देखने जा रहा था तो.....

कल ही अमरसिह पुत्र मकर सिंह ग्रा0 बडासू वालों ने बताया कि दिनांक 4.9.2000 को रोज की भॉति जब मैं.....

Above assertion made in the written report by the complainant of the case Sri Satey Singh clearly goes to show that each of the witnesses informed him regarding alleged

circumstances connecting the accused persons with the crime only one day earlier of scribing the written report Ex.ka-1.

P.W.5 Shishupal in his cross-examination has stated that he gave statement to the police at 10.30 or 11.00 AM on 11.9.2000. He categorically stated that the police also took statement of P.W.2 Rakesh Chandra at that time. Rakesh also shown them the place where accused persons and deceased were dropped from his taxi. This statement of P.W.5 Shishupal clearly indicates that investigation of the case was started by the Police after recovery of the dead body of Umed Singh from riverbed on 7.9.2000 and after lodging of report paper no. 39-ka/2, and prior to scribe of written report Ex.ka-1 the Police had already taken the statements of witnesses.

Thus the written report Ex.ka-1 is concocted and fabricated and was prepared after deliberation to develop the circumstances to implicate the accused persons in the crime. When in fact written report Ex.ka-1 cannot be termed as first information report, as prior to scribe of Ex.ka-1, a report had already been lodged by Sri Satey Singh, P.W.1 in Police Reporting Post, Gaurikund on 7.9.2000 at 8.50 AM regarding missing of Sri Umed Singh on 4.9.2000. The copy of which has been filed by the prosecution itself. In this report Sri Satey Singh P.W.1 has not expressed any doubt regarding murder of his brother or enmity with any person nor he expressed any suspicion on the accused persons.

In his cross examination P.W.1 Satey Singh has stated that Driver Rakesh met him on 6.9.2000 at 4.30 AM and informed him that accused persons and deceased were travelling by his taxi on 4.9.2000. This statement contradicts his earlier assertion made in the written report Ex.ka-1.

In *Alla China Apparao and others Vs. State of A.P. (2000)* 8 SCC 440 the Apex Court has held as under:

"A question that now arises is that where first information report is shown to have actually been recorded without delay and investigation started on its basis, if any delay is caused in sending the same to the Magistrate which the prosecution fails to explain by furnishing reasonable explanation, what would be its effect upon the prosecution case. In our view, ipso facto the same cannot be taken to be a ground for throwing out the prosecution case if the same is otherwise trustworthy upon appreciation of evidence which is found to be credible. However, if it is otherwise, an adverse inference may be drawn against the prosecution and the same may affect the veracity of the prosecution case, more so when there are circumstances from which an inference can be drawn that there were chances of manipulation in the first information report by falsely roping in the accused persons after due deliberations. Reference in this connection may be made to decisions of this Court in the cases of Pala Singh Vs. State of Punjab, Sarwan Singh Vs. State of Punjab, State of Karnataka Vs. Moin Patel, Harpal Singh Vs. Devinder Singh, Shiv Ram Vs. State of U.P., Anil Rai Vs. State of Bihar and Munshi Prasad Vs. State of Bihar."

For these reasons, written report Ex.ka-1 cannot be the basis for conviction of the accused appellants and no reliance can be placed on the statement of P.W.1 Satey Singh that deceased told him several times that Ramesh had obtained Rs.20,000/- from him (deceased) but he is not willing to repay the same.

The learned Sessions Judge erred in law by not considering this aspect of the case.

Circumstance No. (ii)

The dead body of the deceased has been recovered from the riverbed and it was identified by the relatives and villagers of the deceased. P.W.7 Darshan Singh is the witness of recovery of dead body and Panchayatnama. He proved his signatures on Panchayatnama. P.W. 9 Ajai Shah, Investigating Officer has also stated that he prepared site plan of the place of recovery of the dead body at the pointing out of witnesses. He proved site plan Ex.ka-14. P.W.4 Dr. Anupam Chaturvedi has proved post mortem report Ex. Ka-2. In his statement on oath he has stated that death of deceased Umed Singh was caused due to ante mortem injury no. 1 and 3, which may be caused by lathi and danda. He has also stated that injuries no.2 and 4 were caused by stones and injuries no. 5 and 6 were caused by friction on the earth. Thus the medical evidence supports the case of the prosecution that the death of the deceased was caused by sustaining fatal injuries to him and thereafter dead body was flown into the river but as there is no direct evidence that the death of deceased Umed Singh was caused by beating him with lathi and Danda by the accused persons, the medical evidence has no use to help the prosecution to prove its case against the accused persons. Thus this circumstance also does not connect the accused persons with the crime.

Circumstances No.(iii)

The most important circumstance on which the prosecution has relied to prove the guilt of the accused is the last seen of the deceased in the company of accused persons. The important witness to prove this fact is P.W.2 Rakesh

Chandra Tiwari. He is driver of Taxi No. UP 18-0013. He has stated in his examination in – chief that accused persons along with the deceased were boarded on his taxi on 4.9.2000. They dropped between Mirkhi and Rampur. He also saw accused persons and the deceased going towards the river.

However, in his cross examination P.W. 2 Rakesh Chandra Tiwari has stated that he has seen the accused persons first time when they boarded on his taxi on 4.9.2000 at Gaurikund and thereafter he was seeing them only in the Court. This statement of P.W.2 Rakesh Chandra Tiwari contradicts the assertion made by P.W.1 Satey Singh in paragraph 2 of the written report Ex.ka-1 and in his statement on oath, where he stated that Rakesh Chandra Tiwari informed him the names as well as residence of the accused persons, who boarded on his taxi at Gaurikund along with the deceased and were dropped at Baura Tok. Thus if this witness did not know the accused persons prior to the date when they boarded on his taxi at Gaurikund, there was no occasion for him to give information to complainant Satey Singh, stating the names, nationality and residential address. This witness has not claimed that the accused persons themselves gave their introduction to him, prior to boarding on his taxi. P.W.2 Rakesh Chandra Tiwari in his cross examination has admitted that no identification parade was conducted by the police. Thus the statement of P.W.2 Rakesh Chandra Tiwari is self-contradictory and also contracts the written report Ex.ka-1 as well as the statement of P.W.1 Satey Singh, and does not go to help the prosecution in any way.

P.W.5 Shishupal Singh is another witness examined by the prosecution to prove the circumstance of last seen. He has

stated in his examination in – chief that on 4.9.2000 at about 12.30 PM he saw the accused persons quarrelling with the deceased at Kaladungi Gadhera. They were across the river, therefore, he could not reach at that place. In his cross examination this witness has stated that he gave statement to the police at 10.30 or 11.00 AM on 11.9.2000. He categorically stated that the police also took statement of P.W.2 Rakesh Chandra at that time. Rakesh also showed them the place where accused persons and deceased were dropped from his taxi. This witness has stated that he saw the accused persons quarrelling with the deceased for about 5 minutes from a distance of 100 to 150 meters. He has not stated that he saw the accused persons causing injuries to the deceased with lathi, danda and stones. The statement of this witness cannot be believed as he did not told this incident to the police or anybody else in the village till 11.9.2000, whereas he is also the resident of the village of deceased and the complainant. He has not stated anywhere in his statement that the accused persons were known to him from before the incident. Thus no reliance can be placed on the statement of this witness.

The prosecution has further examined P.W.3 Amar Singh also to corroborate the circumstance of last seen. This witness has stated that on 4.9.2000 he was returning from Gaurikund to his village after selling milk. He dropped from Taxi at Rampur and after taking meal; he started on foot for his village Badasu. He saw three Napalies coming from riverside towards Bauraghat. He recognized two of these persons as accused appellants in the Court. This witness has stated that when he inquired from those persons as to from where they were coming but they did not reply. In his cross-examination this witness has

admitted that the accused persons were not known to him from before the incident. He did not know their names and police has not got done identification of the accused persons from him. Thus the statement of this witness also does not help the prosecution to prove its case.

In (1996) 10 SCC 193, ***C. Chenga Reddy Vs. State of A.P.*** it has been observed as under:

> *"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."*

In the case of *Bodhraj alias Bodha and others Vs. State of Jammu & Kashmir (2000) 8* SCC 45 the Apex Court has held as under:

"It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (see Hukam Singh Vs State of Rajasthan, Eradu Vs. State of Hyderabad, Earabhadrappa Vs. State of Karnataka, State of U.P. Vs. Sukhbasi, Balwinder Singh Vs. State of Punjab and Ashik Kumar Chatterjee Vs. State of M.P. The circumstances from which an inference as to the guilt of

the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram Vs. State of Punjab it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

In *Padala Veera Reddy Vs. State of A.P.* it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (SCC pp. 710-11, para 10)

> *"10. (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
>
> *(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*
>
> *(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and*
>
> *(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis that that of guilt of the accused and such evidence should not only be*

consistent with the guilt of the accused but should be inconsistent with his innocence."

In State of U.P. Vs. Ashok Kumar Srivastava *it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.*

Sir Alfred wills in his admirable book ***"Wills' Circumstantial Evidence"*** *(Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in al cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.*

After relying upon the aforesaid facts the Apex Court has come to the conclusion that conviction can be based solely on

the circumstantial evidence but it should be tested by the touch-stone of law relating to circumstantial evidence and it should be a complete chain.

Further, in Hanumant Govind Nargundkar Vs State of M.P. it was observed thus: (SCC pp. 345-46, para 10)

"it is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

In the instant case neither the circumstantial evidence of last seen, adduced by the prosecution is of conclusive nature nor it form a complete chain of circumstances to exclude every hypothesis, which indicates towards the innocence of the accused persons. The statements of the witnesses are self-contradictory and cannot be relied upon to establish the fact that the deceased was last seen along with the accused persons and thereafter he was not found alive. Thus the trial Court was wrong to hold conviction of the accused appellants on the basis of the evidence adduced by the prosecution to establish the circumstance of last seen of the deceased in the company of the accused persons.

Circumstance No. (iv)

The prosecution has come with another circumstance i.e. recovery of the belongings of the deceased on the pointing out of accused persons. The prosecution has adduced evidence to prove that recovery of the clothes of the deceased was made at the instance of the accused persons. Apart from the Police witnesses the prosecution has examined P.W. 8 Mohan Singh. He has stated in his examination in chief that clothes of the deceased were recovered from a bush on riverbank. He proved the recovered clothes of the deceased as material Ex. 1 to 3. In his cross-examination this witness has categorically stated that the accused persons have not stated at the Police Station that they would recover the clothes nor they stated anything regarding recovery of clothes at the place from where the clothes were recovered.

Investigating Officer P.W.9 Ajai Shah has also stated that at the instance of accused persons they went to riverbank where the clothes and shoes of the deceased were recovered from a bush. Recovery memo of which was prepared by S.I. Yogendra Sigh. The witness has proved recovery memo of the belongings of the deceased as Ex.ka.6 but the statement of this witness is of no avail for the prosecution as the independent witness P.W. 8 Mohan Singh has not supported the prosecution case in this regard.

In the case Bodhraj vs. State of J & K (2002) 8 SCC 45, the Apex Court while dealing with the recovery of Section 27 of the Evidence Act, has held as under:

"Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of information given by the accused while in custody. The question is whether the evidence

relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Indian Evidence Act, 1872 (in short "the Evidence Act") is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against the accused. This position was succinctly dealt with by this Court in Delhi Admn. Vs. Bai Krishan and Mohd. Inayatuallah vs. State of Maharastra. The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequence of the preceding sections, be admitted in evidence. It would appear that under section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police. The requirement of police custody is productive of extremely anomalous results and may lead to the exclusion of much valuable evidence in cases where a person,

who is subsequently taken into custody and becomes an accused, after committing a crime meets a police officer or voluntarily goes to him or to the police station and states the circumstances of the crime which lead to the discovery of the dead body, weapon or any other material fact, in consequence of the information thus received from him. This information which is otherwise admissible becomes inadmissible under Section 27 if the information did not come from a person in the custody of a police officer or did come from a person not in the custody of a police officer. The statement which is admissible under Section 27 is the one which is the information leading to discovery."

In the present case the prosecution has utterly failed to establish that the accused appellants have voluntarily made statements that they would recover the clothes of the deceased and in consequence of the information given by the accused recovery was made. Thus the circumstance of recovery under section 27 of the Evidence Act, does not go to help the prosecution case in any way.

Circumstance No. (v)

Much reliance has been placed by the prosecution on the alleged extra judicial confession made by the accused persons before the Police Officials after their arrest. The prosecution has filed statement of accused made before the Investigating Officer which is copy of G.D. report no. 34 dated 13.9.2000, which has been proved by P.W.9 S.I. Ajai Shah as Ex.ka-11. Surprisingly enough this statement has been recorded in the G.D. of Police Station and not on the Case Diary by the Investigating Officer. This conduct of the Investigating officer shows utter disregard to the procedure provided for investigation under the law.

Anyhow, the admission made by the accused before a Police Officer in custody is not admissible in evidence and the learned Sessions Judge has erred in law by placing reliance on such evidence.

Circumstance No. (vi)

Another circumstance against the accused persons is that in their statements under section 313 Cr.P.C. they come with denial in toto. The accused failed to adduce any evidence to contra to prove the so called oblique motive of the witnesses to implicate them in the false case nor state anything mitigating in their statement under section 313 Cr.P.C. as false wholesale denial. Here in this case the prosecution has failed to establish its case against the accused persons and the witnesses produced by the prosecution are not reliable and their statements are inconsistent and self-contradictory. Therefore, if the accused persons have not make any case in their defence in their statements under section 313 Cr.P.C. and came with wholesome denial, it makes no difference and does not help the prosecution in any way.

Thus this circumstance also establishes the guilt of the accused appellants.

Circumstance No.(vii)

Three accused persons is said to have committed the murder of deceased Umed Singh. Out of them accused appellants Ramesh and Kishan Bahadur could only be arrested by the police. The third culprit Prem Bahadur has succeeded to escape and is absconding. P.W.9 Ajai Shah, Investigating Officer has stated on oath that despite efforts by him Prem Bahadur could not be arrested. All the culprits are Nepalies and they are related to each other. Absconding of one of the culprits

is no indication towards the guilt of the accused persons and accused cannot be held guilty as the Police failed to arrest one of the accused person suspected in the crime. Thus this circumstances also does not help the prosecution in proving its case.

Conclusion:

The apex court in the case of Mohibur Rahman and another Vs. State of Assam, 2002 AIR SCW 3523. The Hon'ble Judges observed that:-

"It is well settled by a catena of decision of this Court that in order to find conviction on circumstantial evidence each of the incriminating pieces of circumstantial evidence should be proved by cogent and reliable evidence and the Court should be satisfied that the proved pieces of circumstantial evidence taken together form such a chain wherefrom no inference other than of guilt can be drawn against the accused persons or, in other words, the proved pieces of circumstantial evidence should not be capable of being explained on any hypothesis other than the guilt of the accused."

In the present case the prosecution examined as many as four witnesses to prove pieces of circumstances evidence. P.W.1 Satey Singh is the informant and scribe of written report. His statement based on the hear say and the written report Ex.Ka-1 as held above is concocted and fabricated and was prepared after deliberation. The accused appellants also cannot be convicted on the basis of evidence of P.W.2 Rakesh Chandra Tiwari, P.W.3 Amar Singh and P.W.8 Mohan Singh as their statements are not consistent and unable to form a complete chain of circumstances.

The entire evidence adduced by the prosecution is self-contradictory and is not conclusive to prove the guilt of the accused. From the evidence on record no complete chain of circumstances is formed to prove the guilt of the accused appellants. The prosecution has utterly failed to establish the facts and circumstances which unerringly point out the guilt of the accused for committing murder of Umed Singh punishable under section 302 read with 34 I.P.C. and for disappearing the evidence of said offence punishable under section 201 I.P.C.

The findings arrived at by the learned Sessions Judge cannot be upheld. In the result, the appeal is allowed. The conviction and sentence passed by the Sessions Judge, against the accused appellants Ramesh and Kishan Bahadur under Section 302 read with 34 I.P.C. and Section 201 I.P.C. is hereby set aside and the accused appellants are acquitted.

The accused appellants are on bail. Their bail bonds are cancelled and sureties are discharged.

Let a copy of the judgment along with record be sent to the Court below for needful action and compliance of order.

(Rajesh Tandon, J.) **(P.C. Verma J.)**

August 4, 2004

* Dhyani